



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-HQ-OAR-2019-0603; FRL-10002-78-OAR]

Findings of Failure to Submit a Clean Air Act Section 110 State Implementation Plan for Interstate Transport for the 2015 Ozone National Ambient Air Quality Standards (NAAQS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final action.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action finding that seven states have failed to submit infrastructure State Implementation Plans (SIPs) to satisfy certain interstate transport requirements of the Clean Air Act (CAA) with respect to the 2015 8-hour ozone national ambient air quality standards (NAAQS). Specifically, these requirements pertain to prohibiting significant contribution to nonattainment, or interference with maintenance, of the 2015 8-hour ozone NAAQS in other states. These findings of failure to submit establish a 2-year deadline for the EPA to promulgate Federal Implementation Plans (FIPs) to address these interstate transport requirements for a given state unless, prior to the EPA promulgating a FIP, the state submits, and the EPA approves, a SIP that meets these requirements.

DATES: Effective date of this action is **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: General questions concerning this document should be addressed to Mr. Thomas Uher, Office of Air Quality Planning and Standards, Air

Quality Policy Division, Mail Code C539-04, 109 TW Alexander Drive, Research Triangle Park, NC 27711; telephone (919) 541-5534; email: *uher.thomas@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Notice and Comment Under the Administrative Procedures Act (APA)

Section 553 of the APA, 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. The EPA has determined that there is good cause for making this final agency action without prior proposal and opportunity for comment because no significant EPA judgment is involved in making a finding of failure to submit SIPs, or elements of SIPs, required by the CAA, where states have made no submissions or incomplete submissions, to meet the requirement. Thus, notice and public procedure are unnecessary. The EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

B. How can I get copies of this document and other related information?

The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2019-0603. All documents in the docket are listed and publicly available at <http://www.regulations.gov>. Publicly available docket materials are also available in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, William Jefferson Clinton West Building, Room 3334, 1301 Constitution Avenue NW, Washington, D.C. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744 and the telephone number for the Office of Air and Radiation Docket and Information Center is (202) 566-1742. For

additional information about the EPA's public docket, visit the EPA Docket Center homepage at:

<http://www.epa.gov/epahome/dockets.htm>.

C. *How is the preamble organized?*

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The table below lists the states that failed to make a complete interstate transport SIP submittal addressing CAA section 110(a)(2)(D)(i)(I) requirements for the 2015 ozone NAAQS.

For questions related to specific states mentioned in this document, please contact the appropriate EPA Regional office:

Regional Offices	States
EPA Region 1: Alison Simcox, Manager, Air Quality Branch, EPA Region I, 5 Post Office Square, Suite 100, Boston, MA 02109-3912.	Maine, Rhode Island
EPA Region 3: Joseph Schulingkamp, Air Protection Division, EPA Region III, 1650 Arch Street, Philadelphia, PA 19103-2187.	Pennsylvania, Virginia
EPA Region 6: Mary Stanton, Chief, Infrastructure and Ozone Section, EPA Region VI, 1201 Elm Street, Suite 500, Dallas, TX 75270.	New Mexico
EPA Region 8: Adam Clark, EPA Region VIII, Air and Radiation Division, 1595 Wynkoop St., Denver, CO 80202.	South Dakota, Utah

II. Background and Overview

A. Interstate Transport SIPs

CAA section 110(a) imposes an obligation upon states to submit SIPs that provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within 3 years following the promulgation of that NAAQS. CAA section 110(a)(2) lists specific requirements that states must meet in these SIP submissions, as applicable. The EPA refers to this type of SIP submission as an “infrastructure” SIP because it ensures that states can implement, maintain and enforce the new or revised air standards. Within these requirements, CAA section 110(a)(2)(D)(i) contains requirements to address interstate transport of NAAQS pollutants. A SIP revision submitted for this sub-section is referred to as an “interstate transport SIP.” In turn, CAA section 110(a)(2)(D)(i)(I) requires that such a plan contain adequate provisions to prohibit emissions from the state that will contribute significantly to nonattainment of the NAAQS in any other state (“prong 1”) or interfere with maintenance of the NAAQS in any other state (“prong

2”). Interstate transport prongs 1 and 2, also called collectively the “good neighbor” provision, are the requirements relevant to this findings document.

Pursuant to CAA section 110(k)(1)(B), the EPA must determine no later than 6 months after the date by which a state is required to submit a SIP whether a state has made a submission that meets the minimum completeness criteria established pursuant to CAA section 110(k)(1)(A). These criteria are set forth at 40 CFR part 51, appendix V. The EPA refers to the determination that a state has not submitted a SIP submission that meets the minimum completeness criteria as a “finding of failure to submit.” If the EPA finds a state has failed to submit a SIP to meet its statutory obligation to address CAA section 110(a)(2)(D)(i)(I), then pursuant to CAA section 110(c)(1), the EPA has not only the authority, but the obligation, to promulgate a FIP within 2 years to address the CAA requirement. This finding, therefore, starts a 2-year “clock” for promulgation by the EPA of a FIP, in accordance with CAA section 110(c)(1), unless prior to such promulgation the state submits, and the EPA approves, a submittal from the state to meet the requirements of CAA section 110(a)(2)(D)(i)(I). Even where the EPA has promulgated a FIP, the EPA will withdraw that FIP if a state submits and the EPA approves a SIP satisfying the relevant requirements. The EPA notes this action does not start a mandatory sanctions clock pursuant to CAA section 179 because this finding of failure to submit does not pertain to a part D plan for nonattainment areas required under CAA section 110(a)(2)(I) or a SIP call pursuant to CAA section 110(k)(5).

B. Background on 2015 Ozone NAAQS and Related Matters

On October 1, 2015, the EPA promulgated a new 8-hour primary and secondary ozone NAAQS of 70 parts per billion (ppb), which is met when the 3-year average of the annual fourth

highest daily maximum 8-hour concentration does not exceed 70 ppb.¹ Pursuant to the 3-year period provided in CAA section 110(a)(1), infrastructure SIPs addressing the revised standard were due on October 1, 2018.

On September 5, 2019, the EPA announced via its website its intention to make findings that certain states have failed to submit complete interstate transport SIPs for the 2015 ozone NAAQS by November 22, 2019.²

On September 30, 2019, the Sierra Club filed a complaint in the United States District Court for the District of Columbia (D.C. District Court) alleging that the EPA had not fulfilled its mandatory duty to make findings of failure to submit interstate transport SIPs pursuant to CAA section 110(a)(2)(D)(i)(I) with respect to the 2015 ozone NAAQS for twelve states: Arkansas, Hawaii, Louisiana, Maine, Maryland, Mississippi, New Mexico, Pennsylvania, Rhode Island, Utah, Vermont, and Virginia.³ On October 29, 2019, the States of New Jersey and Connecticut filed a complaint in the D.C. District Court alleging that the EPA had not fulfilled its mandatory duty to make findings of failure to submit interstate transport SIPs addressing interstate transport in CAA section 110(a)(2)(D)(i)(I) with respect to the 2015 ozone NAAQS for two states: Virginia and Pennsylvania.⁴

To fulfill its statutory obligations, the EPA is taking this action for all states that have failed to submit complete SIPs addressing CAA section 110(a)(2)(D)(i)(I) for the 2015 ozone NAAQS, not just those states named in the complaints. As explained below, in total, seven states

¹ See Final Rule, National Ambient Air Quality Standards for Ozone, 80 FR 65292 (October 26, 2015).

² U.S. EPA, Interstate Air Pollution Transport, <https://www.epa.gov/airmarkets/interstate-air-pollution-transport>.

³ Complaint, *Sierra Club v. Wheeler*, No. 1:19-cv-02923 (D.D.C. filed Sept. 30, 2019).

⁴ Complaint, *State of New Jersey v. Wheeler*, No. 1:19-cv-03247 (D.D.C. filed Oct. 29, 2019).

have failed to submit complete SIPs while forty-three states and the District of Columbia have submitted complete SIPs addressing CAA section 110(a)(2)(D)(i)(I) for the 2015 ozone NAAQS.

The EPA has included in the docket for this action its correspondence with states regarding the completeness of their SIP submissions. SIPs may be considered complete by either of two methods. First, the EPA may make a determination that a SIP is complete under the “completeness criteria” set out at 40 CFR part 51, appendix V. *See* CAA section 110(k)(1). Second, a SIP may be deemed complete by operation of law if the EPA has failed to make such a determination by 6 months after receipt of the SIP submission. *See* CAA section 110(k)(1)(B).

Five states failed to make any SIP submittal addressing interstate transport for the 2015 ozone NAAQS: Maine, New Mexico, Pennsylvania, Rhode Island, and Virginia. All of these states were identified in the Sierra Club complaint.

The EPA has evaluated the SIP submittals of two states, South Dakota and Utah, for completeness pursuant to the criteria in 40 CFR part 51, appendix V, and concluded that these are incomplete SIP submissions.⁵ On November 21, 2019, the EPA sent letters to these two states explaining our incompleteness determination. These letters are included in the docket for this action. As explained in those letters, the completeness criteria under 40 CFR part 51, appendix V, section 2.1(g), require a certification that public hearing(s) were held in accordance with the information provided in the state’s public notice and the State’s laws and constitution, if applicable and consistent with the public hearing requirements in 40 CFR 51.102. Under § 51.102(a), states must either hold a public hearing or provide the public the opportunity to request a public hearing. South Dakota and Utah did not provide the necessary certification under section 2.1(g) of appendix V that a public hearing was held or that they had provided the

⁵ Utah was identified in the Sierra Club complaint, but South Dakota was not.

opportunity for the public to request a public hearing in accordance with 40 CFR 51.102(a). As a result, the EPA determined that these SIP submissions are incomplete. Where the EPA determines that a SIP submission does not meet the appendix V completeness criteria, “the State shall be treated as not having made the submission” CAA section 110(k)(1)(C). Accordingly, the EPA is finding in this document that South Dakota and Utah have failed to submit complete SIP revisions addressing CAA section 110(a)(2)(D)(i)(I) as to the 2015 ozone NAAQS. These states may, if they choose, resubmit to the EPA complete SIPs, which the EPA will review and act upon at a later date.

In all other cases, the EPA has determined that the SIP submittals are complete or they have been deemed complete by operation of law. In particular, the six remaining states identified in Sierra Club’s complaint filed in the D.C. District Court have made complete SIP submittals addressing the good neighbor provision for the 2015 ozone NAAQS: Arkansas, Hawaii, Louisiana, Maryland, Mississippi, and Vermont. As a result, there is no longer a basis to make findings of failure to submit for these states.

The EPA is issuing national findings of failure to submit interstate transport SIPs addressing the requirements of CAA section 110(a)(2)(D)(i)(I) as to the 2015 ozone NAAQS, for all states that have not made complete submissions as of the date of this document.

III. Findings of Failure to Submit for States That Failed to Make an Interstate Transport SIP Submission for the 2015 Ozone NAAQS

The EPA is making findings of failure to submit for seven states. The EPA finds the following states have not submitted complete interstate transport SIPs to meet the requirements of CAA section 110(a)(2)(D)(i)(I) for the 2015 ozone NAAQS: Maine, New Mexico, Pennsylvania, Rhode Island, South Dakota, Utah, and Virginia. Notwithstanding these findings,

and the associated obligation of the EPA to promulgate FIPs for these states within two years of this finding, the EPA intends to continue to work with states subject to these findings in order to provide assistance as necessary to help them develop approvable SIP submittals in a timely manner.

IV. Environmental Justice Considerations

This document is making a procedural finding that certain states have failed to submit a SIP to address CAA section 110(a)(2)(D)(i)(I) for the 2015 ozone NAAQS. The EPA did not conduct an environmental analysis for this action because it would not directly affect the air emissions of particular sources. Because this action will not directly affect the air emissions of particular sources, it does not affect the level of protection provided to human health or the environment. Therefore, this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations.

V. Statutory and Executive Order Reviews

A. Executive Orders 12866: Regulatory Planning and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was, therefore, not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because it finds that seven states failed to submit a SIP to meet their statutory obligation to address CAA section 110(a)(2)(D)(i)(I) for the 2015 ozone NAAQS.

C. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act. This final action does not establish any new information collection requirement apart from what is already required by law. This finding relates to the requirement in the CAA for states to submit SIPs under section 110(a)(2)(D)(i)(I) of the CAA for the 2015 ozone NAAQS.

D. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553 or any other statute. This action is not subject to notice and comment requirements because the agency has invoked the APA “good cause” exemption under 5 U.S.C 553(b). I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. The action is a finding that the named states have not made the necessary SIP submission for interstate transport to meet the requirements under section 110(a)(2)(D)(i)(I) of the CAA.

E. Unfunded Mandates Reform Act of 1995 (UMRA)

This action does not contain any unfunded mandate as described in UMRA 2 U.S.C. 1531-1538 and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This action finds that seven states have failed to complete the requirement in the CAA to submit SIPs under section 110(a)(2)(D)(i)(I) of the CAA for the 2015 ozone NAAQS. No tribe is subject to the requirement to submit a transport SIP under section 110(a)(2)(D)(i)(I) of the CAA for the 2015 ozone NAAQS. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it is a finding that certain states have failed to submit a complete SIP that satisfies interstate transport requirements under section 110(a)(2)(D)(i)(I) of the CAA for the 2015 ozone NAAQS and does not directly or disproportionately affect children.

I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations. In finding that certain states have failed to submit a complete SIP that satisfies the interstate transport requirements under section 110(a)(2)(D)(i)(I) of the CAA for the 2015 ozone NAAQS, this action does not adversely affect the level of protection provided to human health or the environment.

L. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

M. Judicial Review

Section 307(b)(1) of the CAA indicates which federal Courts of Appeal have venue for petitions of review of final actions by the EPA under the CAA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit if: (i) the agency action consists of “nationally applicable regulations promulgated, or final action taken, by the Administrator,” or (ii) such action is locally or regionally applicable, but “such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.”

This final action is nationally applicable. To the extent a court finds this final action to be locally or regionally applicable, the EPA finds that this action is based on a determination of “nationwide scope or effect” within the meaning of CAA section 307(b)(1). This final action

consists of findings of failure to submit required interstate transport SIPs for the 2015 ozone NAAQS from seven states located in four of the ten EPA Regional offices and five different federal judicial circuits. This final action is also based on a common core of factual findings concerning the receipt and completeness of the relevant SIP submittals. For these reasons, this final action is nationally applicable or, alternatively, to the extent a court finds this action to be locally or regionally applicable, the Administrator has determined that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the *Federal Register*. Filing a petition for reconsideration by the Administrator of this final action does not affect the finality of the action for the purposes of judicial review nor does it extend the time within which a petition for judicial review must be filed and shall not postpone the effectiveness of such rule or action. Thus, any petitions for review of this action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the *Federal Register*.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements.

Dated: November 22, 2019.

Anne L. Idsal,
Acting Assistant Administrator.
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